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BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Investigation of Possible Improper Subsidization by Chibardun Telephone Cooperative, Inc., of its Subsidiaries and of Possible Related Violations	1090-TI-100

FINAL DECISION

PART I

This case involves an investigation and determination whether Chibardun Telephone Cooperative, Inc. ("Chibardun"), violated provisions of Wis. Stat. ch. 196 governing affiliated interest agreements and related prohibitions against cross-subsidization by telecommunications utilities. The Commission approves the fundamental framework and holdings of the Proposed Final Decision of July 17, 2001, with modifications. Part I generally sets forth the Commission's reasons for varying from the Proposed Final Decision, as obliged by Wis. Stat. § 227.46(2) in a class 2 proceeding. Part II sets forth the Final Decision on the merits, incorporating the changes ordered.

Attached hereto as Appendix A is a list of the parties who participated in this proceeding.

The Commission has reviewed the record, the briefs, the Proposed Final Decision, and the objections submitted with respect thereto by the Commission staff (staff), Chibardun, and intervenor Marcus Cable Partners, LLC (Marcus). The variances from the Proposed Final Decision adopted in this Final Decision are both substantive and technical. The Commission adopts most of the recommendations of the staff set forth in their objections to the Proposed Final Decision dated August 1, 2001. But the Commission has also reviewed the record and

determines that the record supports further changes, which include modifications regarding the loan omitted on the final decision.

Specifically, the Commission determines that the unconditional, uncapped guarantee given by Chibardun without charge for the benefit of its start-up affiliates may be better analyzed by describing the direct and indirect natures of the subsidies affected. The Commission also concludes that, on the available record, including reasonable inferences there from, the issues of executive and accounting payroll allocation, the transfer valuation of the 67 strand miles of fiber, and the license or royalty fee for the use of intangible goodwill, trade names and service marks (collectively, "goodwill") may be substantively resolved without follow-up proceedings. The Commission makes those conclusions, as discussed further below and in Part II as incorporated by reference.

Substantive Changes

First, the Commission finds that the record, which includes the parties' briefs and objections, affords a basis for concluding that the uncompensated, uncapped guarantee given by Chibardun was both a direct and indirect subsidy. This modification of the legal analysis better tracks with the recognition in Wis. Stat. § 196.204(1) that subsidies may be both direct and indirect in their nature. From this framework, it becomes easier to recognize staff witness Ms. Lois Hubert's testimony as describing the size of the direct subsidy and placing the section containing that discussion after the section "Status of Patronage Capital." The latter section has a concluding paragraph added to better describe the nature and magnitude of the indirect subsidy

occasioned by Chibardun's financial service of lending its "credit," or borrowing potential, which is essentially the same as Chibardun's balance sheet net worth.

The Commission finds that the testimony and exhibits of staff witnesses Ms. Hubert and Mr. Kevin Klingbeil confirm that as an indirect subsidy, an uncapped guarantee pledges more than that allowed by the dollar amount inherent in the statutory "retained earnings" limit on subsidization of affiliates. The direct subsidy is the failure to take compensation for the additional interest that the borrowing entities can avoid paying by reason of the guarantee.[1] The value of the subsidies can be determined and the revisions herein do so, adopting staff's calculations from confidential record data to determine the extent of the indirect subsidy associated with the guarantee.[2] Changes made include revisions to Findings of Fact ¶¶ 9 and 12, Conclusions of Law ¶ 1, and pages 15, 18-22, and 25 of the Opinion section in Part II.

Second, the Commission finds that the Proposed Final Decision incorrectly narrows the construction of Issue No. 5 to "current" accounting practices. The parties and the Administrative Law Judge, without any record objection, actually tried the issue as covering Chibardun's accounting practices since the start-up of the affiliates, developing a record consistent with the Commission's intention. The Commission's intention in opening this investigation in January 1999 was to look at the facts that the staff's investigation (Ex. 1) produced regarding the period of 1997-1998. A major point in issuing a Notice of Proceeding *and Investigation* was that

[1] The guarantee to the lender is set forth in the Loan Agreement. Chibardun's failure to extract any compensation from its affiliates for the service may be seen as an unexpressed part of the Loan Agreement, or as a wholly separate "inaction" on the part of Chibardun. However, it is unnecessary to determine precise transactional detail as the found facts (Findings of Fact ¶ 7, in particular) determine the subsidy effects necessary to apply Wis. Stat. § 196.204(1).

[2] With respect to the calculations, the Commission disagrees with Marcus' argument that equity investments fall within the prohibition of subsidization set forth in Wis. Stat. § 196.204(1). If it had such an intent, the legislature could certainly have stated it much more clearly than in the words it used in the text of present Wis. Stat. § 196.204(1).

further facts needed to be developed on allocation practices, a point that staff's investigative report specifically noted as warranting a hearing to review additional evidence. (Ex. 1, at 1, 3, and 6-7). It would be an unreasonable construction of the Amended Notice of Proceeding, dated March 30, 1999, to infer that, while the Commission listed as an issue remedies for past violations (Issue No. 7), it nonetheless limited Issue No. 5 to dealing only with the immediate present—totally disregarding the apparent violations in 1997 that motivated Marcus' protests to the Commission and the staff's investigative findings from 1998.

Moreover, accounting practices for Chibardun were not specifically known, but reasonably expected to be consistent from year to year. Chibardun's accountant, Mr. Gary Meier, testified to this very fact (Tr. 650), noting that accountants dropped some years ago the financial statements attestation that accounting principles were "consistently applied" because that was a "foregone conclusion." Thus, the meaning of "is" in "whether Chibardun is adequately allocating" in Issue No. 5 must be seen from an accounting view of "current" that actually covers a multi-year time frame. With a correct view of Issue No. 5, the issue of accounting adjustments may be decided, provided there is substantial evidence of record.

The foregoing segues to the third area of difference from the Proposed Final Decision. The Commission finds that the record contains substantial evidence to conclude, without post-decision follow-up, the issues of executive and accounting payroll allocation, the valuation of the transfer of the 67 strand miles of fiber to the cable TV affiliate, and the appropriate license or royalty fee for the affiliates' use of Chibardun's "goodwill." The Commission invokes its remedial powers in Wis. Stat. § 196.37(2) to make orders to remove the effects of unlawful subsidization and to make Chibardun whole through repayments with interest.

The Commission finds the staff's testimony, particularly that of Mr. Klingbeil, and also that of Marcus witness Mr. Thomas Stolper, to be persuasive on the point that Chibardun has inadequately allocated executive and accounting payroll costs to the affiliates from 1997 through 2000, with the consequent "ripple effects" in other allocated costs. For the reasons stated in Part II, pages 28-29, the Commission adopts the staff's recommended method of adjustment for executive and accounting payroll, using three- and two-prong allocators.

The testimony of staff, as supplemented by Marcus' witnesses in some particulars, convinces the Commission that the 67 strand miles of transferred fiber can be valued more effectively and with better regard for the prohibition on affiliate subsidization in Wis. Stat. § 196.204(1). While still giving Chibardun the benefit of any doubt as to the range in market value, the Commission nonetheless finds that Chibardun should have used a market value. The calculated figure of $83,200, testified to by staff witness Mr. Steven Kihm, and argued by staff, should be the figure booked by Chibardun to remedy its non-compliance with Wis. Stat. § 196.204(1) in that transaction. The changes made on this point are set forth at pages 27-28 of Part II.

Finally, the annual $500 license or royalty fee paid by the affiliates to Chibardun for the use of goodwill is arbitrarily low and is effectively subsidizing the affiliates. For the reasons stated in Part II, the Commission concludes it has sufficient evidence of Chibardun's actions to make a reasonable inference that the value of the use of goodwill should have been priced at substantially more than a *de minimis* fee. Setting the fee at one percent of the affiliates' gross

sales is reasonable based upon the record, and given the inexactitude in valuing intangibles.[3] The changes and their rationale on this point are set forth at pages 31-32 of Part II.

Technical and Other Changes

The Commission adopts all of the technical changes suggested by staff in its objections, relating to terminology, factual errors, and the status of docket 1-AC-191. The Commission takes official notice of the status of its own proceedings. In addition, the Commission is making its own changes to use the term "guarantee" throughout the Final Decision and to remove the first person pronoun and substitute the Commission. Moreover, the Commission disagrees with the Proposed Final Decision's characterization of the Commission's efforts respecting affiliate relations rulemaking as subjective and unnecessary. The comments are removed.

The Commission finds no need to determine the scope of the Commission's jurisdiction to conduct class 2 proceedings. The determination to order remedial actions pursuant to Wis. Stat. § 196.37(2), makes such a discussion unnecessary. The changes made are on pages 33-34 in Part II. The Commission finds that the Wisconsin Supreme Court decision in *GTE North Inc. v. Pub. Serv. Comm.*, 176 Wis. 2d 559, 500 N.W.2d 284 (1993), strongly affirms the Commission's broad jurisdiction to order remedies that undo past illegal actions, provided, of course, the remedies do not constitute retroactive ratemaking.

The foregoing remedial power encompasses the power to order payment of interest. As much as practicable, interest seeks to restore the "injured" utility (or consumer, in typical refund

[3] Payment of the fee by the affiliates is effectively a book transfer from the affiliate pocket of the Chibardun family to the parent entity. Nothing, however, bars the parent from turning around and immediately booking the fee as an equity investment in the affiliate.

cases) to the *status quo ante* and to remove any advantage secured by the offending party. In typical rate refund cases, *e.g. Notification of CenturyTel of Central Wisconsin, LLC, That It Intends to Establish Initial Interim Telephone Rates, et al.* PSCW Dockets 2055-TR-100/ 5846-TR-100 (November 3, 2000), the Commission orders that the utility refund to customers with interest at the higher of the utility's short-term debt rate or the rate established by the Commission on consumer deposits pursuant to Wis. Admin. Code chs. PSC 113, 134, 165, and 185. Here, the analogous measure would protect the utility (and its customers) by ordering that any interest on amounts due from the affiliates be at the higher of the legal rate under Wis. Stat. § 138.04 or Chibardun's cost of capital or long-term debt. The changes are in the discussion of the issues noted and Order ¶¶ 3 and 4 in Part II.

The Commission corrects the Proposed Final Decision to indicate that the Commission is not obliged in Wis. Stat. § 196.204(3) to promulgate rules in setting necessary minimum accounting and reporting requirements to enforce Wis. Stat. § 196.204. The HOCOM/LOCOM[4] methodology may also be subject to formal pronouncement via Commission action or order. Such a Commission action would be exempt from rulemaking because it "prescribes or relates to a uniform system of accounts for any person, including a municipality, that is regulated by . . . the public service commission." Wis. Stat. § 227.01(13)(s). The discussion on page 30 of Part II reflects this change.

[4] Denotes "Higher of Cost or Market/Lower of Cost or Market." In utility regulation dealing with transactions wherein an affiliate buys property or services from the utility, the utility is required to charge prices at the higher of cost or market. When the utility buys from an affiliate, the reverse is typically required, that the utility obtain the lower of the affiliate's cost or the market value. These pricing methodologies are intended to protect against manipulation of utility finances and passing on unnecessarily higher costs to consumers in higher retail rates.

As final technical items, the Commission corrects several minor factual errors, makes several minor consistency changes in the text, and removes the first person references to apply customary Commission order language.

PART II

Introduction

This is a class 2 contested case. The parties are the staff, Marcus and Chibardun. The case originated in 1997, when Marcus complained to the Commission that Chibardun was illegally subsidizing the activities of its subsidiaries, Chibardun Cable T.V. Corporation (Cable Corp.), CTC Telcom, Inc. (Telcom) and CTC Communications, Inc. (Communications). Marcus wanted the Commission to conduct a contested case proceeding, but the Commission declined. Subsequently, the Commission opened an investigation on its own motion.[5] As a result of the investigation, the Commission commenced this contested case.[6] The original parties to this case were staff and Chibardun. On February 21, 2000, the Commission granted Marcus' motion to intervene.

The Amended Notice of Proceeding listed seven issues:

> 1. Whether certain terms of a loan to CTC Communications, Inc., and CTC Telcom, Inc., involve a subsidy from Chibardun to the subsidiaries contrary to Wis. Stat. § 196.204(1)?
>
> 2. Whether Chibardun violated the requirements of Wis. Stat. § 196.52 (1992-93) by not timely filing an affiliated interest agreement it had with Chibardun Cable T.V. Corporation?

[5] The Commission issued its formal Notice of Proceeding and Investigation on January 28, 1999.
[6] The Commission issued its Amended Notice of Proceeding, converting its investigation into a contested case, on March 30, 1999.

3. Whether Chibardun violated the requirements of Wis. Stat. §§ 196.52, 196.25 and 196.219(3) and (4), by failing to timely file an affiliated interest agreement that adequately identified a transfer of certain cable assets to Chibardun Cable T.V. Corporation?

4. Whether Chibardun has complied with Wis. Stat. §§ 196.52, 196.25 and 196.219(3) and (4) by timely filing affiliated interest agreements that adequately describe 1997 loan activity with its subsidiaries CTC Communications, Inc., and CTC Telcom, Inc.?

5. Whether Chibardun is adequately allocating certain payroll expenses and costs of capital assets to avoid subsidization to the subsidiaries contrary to Wis. Stat. § 196.204(1)?

6. Whether Chibardun is pricing services and property, including intangible assets, furnished to the subsidiaries according to methodologies and at price levels that do not provide subsidies to the subsidiaries in violation of Wis. Stat. § 196.204(1)?

7. If violations are found with respect to Nos. 1 through 6 above, what remedies and/or sanctions are appropriate and why?

After a prehearing conference, the Administrative Law Judge restated issues 1 and 2 to read:

1. Whether the August 1997, loan guarantee by Chibardun to CTC Communications, Inc., and CTC Telcom, Inc., (together, the "Subsidiaries") involves a subsidy from Chibardun to the Subsidiaries contrary to Wis. Stat. § 196.204(1)?

2. What remedies and/or sanctions are appropriate for Chibardun's admitted failure to timely file an affiliated interest agreement it had with Chibardun Cable T.V. Corporation, in violation of the requirements of Wis. Stat. § 196.52 (1992-93)?[7]

The hearing was March 28 and 29, and April 3, 2001.[8] The parties filed briefs in May and June.[9]

[7] Chibardun admitted at the prehearing conference that it did not timely file an affiliated interest agreement with Cable Corp.

[8] None of the parties are responsible for the inordinate delay in bringing this case to hearing.

[9] The Wisconsin State Telecommunications Association asked for leave to file an *amicus* brief. Marcus objected. The Administrative Law Judge denied the request, stating that he believed he had all of the information he needed to render a decision.

FINDINGS OF FACT

Background

1. Chibardun provides local telephone services and other communications services in its franchised local exchange area of Almena, Cameron, Dallas, Prairie Farm, Ridgeland, and Sand Creek, Wisconsin, and communications services in areas adjacent to its local exchange area.

2. Chibardun formed Cable Corp., a wholly owned subsidiary, in 1983.

3. Cable Corp. provides cable television services to communities in Chibardun's local exchange area.

4. Chibardun formed two other wholly owned subsidiaries, Telcom and Communications, in 1997. These companies merged in 1998. The surviving company took the name Telcom. Telcom provides local telephone service, long-distance service, cable television, Internet, and other communications-related services to areas outside of Chibardun's franchised telephone service area.

5. The Commission originally certified Telcom as an Alternative Telecommunications Utility (ATU)-Reseller and Communications as an Alternative Telecommunications Utility-Other (Wis. Stat. § 196.01(1d)(f)), or as usually designated, a competitive local exchange carrier ("CLEC"). The Commission does not regulate Cable Corp.

Loan Guarantees

6. In 1997, Telcom and Communications borrowed money from the Rural Telephone Finance Cooperative ("RTFC"). Chibardun guaranteed the loans. It received no consideration for this accommodation.

7. In 1998 and 1999, Telcom borrowed more money from the RTFC. Chibardun executed a separate guarantee for the 1998 loan. Again, it received no compensation. Chibardun did not execute a separate guarantee for the 1999 loan.

8. The RTFC would not have loaned money to Telcom and Communications without Chibardun's guarantee. Chibardun's guarantee to RTFC indirectly subsidized Telcom and Communications by effectively lending to them the use of Chibardun's credit.

9. No lender would have loaned money to Telcom and Communications without a guarantee, a significant risk premium over the loan rate, or equivalent security.

10. In an arms length transaction, Telcom and Communications would have had to pay for a guarantee or other credit enhancement.

11. The direct subsidy value of the guarantee is equal to 100 basis points, an amount of estimated annual interest expense saved by the affiliates due to the Chibardun guarantee to RTFC.

12. To properly account to the Commission for patronage capital, patronage capital should be included in account 4520 of the Uniform System of Accounts (as adopted by the Commission) as "additional paid in capital."

Affiliated Interest Agreements

13. Chibardun provided services to Cable Corp. since 1983 but did not have an affiliated interest agreement with Cable Corp. until 1994, when they executed a "Management Services Agreement." The Management Services Agreement did not mention the sale of assets other than incidental to the provision of management services.

14. Chibardun did not file the Management Services Agreement with the Commission until 1997, and only after Marcus complained to the Commission.

15. Chibardun filed with the Commission affiliated interest agreements with Telcom and Communications on September 24, 1997. The agreements did not mention loan activities.

Sale of Fiber

16. In 1997, Chibardun sold 67 strand miles of unused, buried fiber to Telcom at its net book cost. Net book cost valuation of the transferred fiber provided an economic subsidy to Cable Corp. because the value of the transferred cable exceeded net book cost.

17. A minimum transfer value for the 67 strand miles is $83,200, an asset value consistent with a more appropriate financial market value analysis of the transaction.

Valuation Method

18. Chibardun values all transactions with affiliates at cost, except those involving use of "goodwill." It has no system for determining whether or not it is illegally subsidizing an affiliate with respect to property or services.

19. Chibardun's allocation of executive and accounting payroll costs for 1997 through 2000, did not reasonably assign such costs to affiliates and therefore provided an uncompensated subsidy.

20. The $500 annual fee paid by the affiliates for use of Chibardun's intangible goodwill, a "non-book" asset of Chibardun, is an arbitrary and unreasonably low license or royalty fee that provides an economic subsidy to the affiliates.

CONCLUSIONS OF LAW

1. Chibardun's uncompensated guarantee of the RTFC loans to Telcom and Communications involves subsidies from Chibardun to the subsidiaries within the meaning of Wis. Stat. § 196.204(1). The guarantee given to the lender indirectly subsidized Chibardun's affiliates insofar as Chibardun's net worth was contingently committed to cover the affiliates' loan repayment liability. Chibardun's failure to secure any compensation for that financial service, which equaled the amount of reduction in interest payments, constituted an uncompensated direct subsidy to the borrowing affiliates. The combined subsidies violate Wis. Stat. §§ 196.204(1) and 196.219(3)(g), to the extent they, at any time, exceeded Chibardun's retained capital.

2. Chibardun violated the requirements of Wis. Stat. §§ 196.52, and 196.219(3) and (4), by failing to timely file an affiliated interest agreement that adequately identified a transfer of certain cable assets to Cable Corp.

3. Chibardun failed to comply with Wis. Stat. §§ 196.52, and 196.219(3) and (4) by not timely filing affiliated interest agreements that adequately describe the 1997 loan activity with Telcom and Communications.

4. As discussed in further detail in the Opinion, Chibardun is not, and has not been, pricing services and property, including intangible assets, furnished to the subsidiaries according to methodologies and at price levels that do not provide subsidies to the subsidiaries in violation of Wis. Stat. § 196.204(1).

5. Chibardun's patronage capital is not part of retained earnings, within the meaning of Wis. Stat. § 196.204(1).

6. The loan guarantee executed in 1997, covered future loans in addition to the original loan amounts.

7. The Management Services Agreement between Chibardun and Cable Corp. does not cover the sale of fiber.

8. Chibardun's improper subsidizations described in Findings of Fact ¶¶ 17, 18, 19, and 20, can and should be remedied under Wis. Stat. § 196.37(2) as provided in Order ¶ 4 herein.

9. Remedies provided shall include interest, consistent with long-standing Commission practice and Wis. Stat. § 196.37(2).

10. Chibardun has not violated Wis. Stat. § 196.25.

OPINION

Introduction

In this proceeding, the Commission seeks to enforce the statutes regulating subsidies by utilities of their affiliates. The Commission has charged Chibardun with failing to timely file affiliated interest agreements covering loan activities and the sale of goods and services to its subsidiaries; unlawfully subsidizing its subsidiaries and failing to have in place systems adequate to avoid similar violations in the future.

The Commission concludes that Chibardun has violated Wis. Stat. §§ 196.204(1), 196.52 and 196.219(3) and (4), as charged.[10] Pursuant to Wis. Stat. § 196.44, the Commission must report Chibardun's violations to the attorney general.[11] In addition, Chibardun will be required

[10] Issues 5 and 6 asked whether Chibardun had violated Wis. Stat. § 196.25 (Questionnaires to Utilities). The parties did not address the charge at the hearing or in the briefs. The Commission concludes that Chibardun has not violated this statute.

[11] Because Chibardun violated Wis. Stat. § 196.219, Marcus will have a private right of action against Chibardun.

to file new affiliated interest agreements with Cable Corp. and Telcom, accurately describing the transactions at issue in this proceeding and curing the improper subsidization of affiliates. With respect to the guarantee given RTFC, Chibardun must terminate it altogether or re-write it with RTFC's cooperation, implementing whatever method limits its combination of uncompensated subsidies associated with the guarantee to the level of the retained capital of Chibardun. The level of retained capital should be determined from the latest available financial information of Chibardun. Chibardun will also be required to file reports with the Commission containing information sufficient to demonstrate compliance with Wis. Stat. §§ 196.204 and 196.52, and, in addition to specific remedies provided herein, devise a method for valuing transactions with affiliates so that they do not provide improper subsidies.

This is a close case in many respects. The Commission nonetheless concludes that a loan guarantee is a "subsidy," within the meaning of Wis. Stat. § 196.204(1). The Commission concludes that patronage capital should not be accounted for as retained earnings. The Commission does not believe that Chibardun intentionally failed to file affiliated interest agreements, or to file them late, or to file agreements not broad enough to include the transactions at issue in this proceeding. The Commission, however, has an obligation to promulgate non-accounting rules clearly setting standards for affiliated transactions between an incumbent local exchange carrier ("ILEC") and its affiliates.

Facts

Chibardun is a certified Wisconsin telecommunications utility. It is a cooperative association. In 1983, it organized Cable Corp. as a wholly owned subsidiary. It began to

provide services to Cable Corp. without first obtaining the Commission's approval. Chibardun had no affiliated interest agreement with Cable Corp. until 1994, when the affiliates executed the Management Services Agreement. Chibardun failed to file that agreement with the Commission until 1997 (after Marcus had complained to the Commission).[12]

Shortly after filing the Management Services Agreement, Chibardun sold 67 strand miles of buried fiber to Cable Corp. It charged Cable Corp. the net book value of the fiber, approximately $41,600.

In 1997, Chibardun's management decided to form two additional wholly owned subsidiaries: Telcom and Communications. In order to finance the start-up of these subsidiaries, Chibardun arranged for them to borrow money from the RTFC. To secure the loans, Chibardun executed a guarantee. Chibardun received no consideration from its affiliates for this accommodation.

In 1998, Telcom—by this time, Telcom and Communications had merged—borrowed more money from the RTFC. Again, Chibardun executed a guarantee. Again, Chibardun received no consideration from its affiliate. In 1999, Telcom borrowed still more from the RTFC. This time, Chibardun did not execute a guarantee.

Chibardun loaned money to Telcom in 1997, but did not file an affiliated interest agreement mentioning lending activities until 1998. Among the assets provided to Telcom is the use of the name "Chibardun." Chibardun generally values transactions at net book value. Chibardun allocates costs to Telcom according to a written cost allocation plan.

[12] By this time, the law no longer required the Commission's approval.

Issue 1:

Chibardun's loan guarantees constitute violations of Wis. Stat. § 196.204(1), to the extent the value of the guarantees exceeds Chibardun's retained earnings.

The Scope of the 1997 Guarantee

Before discussing whether Chibardun violated Wis. Stat. § 196.204(1), it is necessary to address Chibardun's contention that it has not guaranteed the 1999 RTFC loan to Telcom because it did not execute a separate guarantee agreement, as it had in 1997 and 1998.

By their terms, the loan documents are to be construed under Virginia law. In Virginia (as in Wisconsin), the meaning of contract language is a question of law. *Craig v. Dye*, 259 Va. 533, 537; 526 S.E.2d 9; 2000 Va. LEXIS 37. The loan documents are clear on their face.

The original guarantee instrument stated that Chibardun's guarantee was security for the payment and performance of all "obligations" of its affiliates. Under the loan agreement, "obligations" include payment of "all present and future duties, covenants and responsibilities" under the agreement and under any "Other Agreements." "Other Agreements" include "all" future agreements, of virtually any kind. The original Mortgage and Security Agreement obligated Chibardun to guarantee other sums due from the Borrower to RTFC at any time and from time to time from the date hereof until the termination of the liability of the Guarantor hereunder . . . "

Construed in the only reasonable way, the original guarantee covers all subsequent loans.[13]

[13] Chibardun argues that its execution of a separate guarantee for the 1998 loan is evidence that the original guarantee did not extend beyond 1997. But, it is not appropriate to consider such extrinsic evidence, when the loan documents are clear and unambiguous.

Loan Guarantees as Subsidies

Only subsidies that exceed retained earnings are prohibited. Therefore, it is necessary to determine the size of the subsidies and the amount of Chibardun's retained earnings and compare them. Chibardun's uncompensated guarantee provided a subsidizing financial service in the form of lending of its credit, the nature and size of which are discussed in this and the next section. Chibardun's "free" guarantee also provided a direct financial service subsidy to the affiliates in the form of reduced interest rates on the loans, as discussed in the section "The Size of the Direct Subsidy."

Neither "subsidy" nor "subsidize" are defined in Wis. Stat. § 196.204. Ordinary dictionary definitions of "subsidy" include: "a grant or gift of money or other property made by way of financial aid," *Webster's Third New International Dictionary of the English Language* (1986); a "grant or contribution of money", *Random House Dictionary of the English Language*, (2d edition, 1987); " a grant of financial aid, usually by a governmental body, to some other person or institution for general purposes." Eric L. Kohler, *A Dictionary for Accountants* (5th Edition 1975).

A loan guarantee is financial aid: the guarantor is providing something of value—its credit—to facilitate obtaining a loan. According to *Home Sav. & Loan Ass'n v. Nimmo,* 695 F2d 1251, 1258 (10th Cir. 1982)(McKay, J., dissenting), the "essential character of [a] loan guaranty program" is a "subsidy."

In *Wabash Valley Power Association, Inc. v. Rural Electrification Admin.,* 988 F. 2d 1480 (7th Cir. 1993), the court stated: "REA-guaranteed loans . . . provide both a subsidy to borrowers in the form of interest rate savings and a cost to the government in the form of risk."

> Whenever [a government loan or loan guarantee credit] program provides credit on more generous terms than the private market would, it directly transfers money (in the form of reduced interest payments) to the recipients.

Leonard, *Checks Unbalanced: the Quiet Side of Public Spending (*1986), at p. 82.

Expert testimony supports the conclusion that a loan guarantee can be a subsidy. It is staff accountant Kevin Klingbeil's opinion that a subsidy is a transfer at less than market value. It is staff financial analyst Lois Hubert's opinion that a subsidy is a transfer of money or other financial consideration without compensation. These opinions are consistent with the Commission's decision in *Application of Superior Water, Light and Power Company for Approval of an Affiliated Interest Contract With Minnesota Power and Light Company to Provide a Loan Guarantee,* Docket no. 5820-AU-109 (1996)("*Superior Water").*

Under the affiliated interest agreement considered in *Superior Water,* the utility was to pay its parent an annual fee in return for the parent's guarantee of a 25-year, $6.5 million note. The Commission approved the transaction, conditioned "on the applicant mak[ing] a showing that the ½ percent per annum guarantee fee is at or below the fair market cost of comparable loan or other credit guarantees in seeking recovery for the fees." That the guarantee was a subsidy is implicit in the decision.

When Chibardun guaranteed the RTFC's loans to Telcom and Communications, it provided a subsidy to the affiliates. The guarantee to the lender provided an indirect subsidy by lending the credit or borrowing potential of Chibardun for the benefit of its subsidiaries. Because the guarantee was unconditional and not capped at the level of retained earnings, Chibardun promised to make available the entire net worth of the cooperative to cover loan defaults by its borrowing affiliates. By accounting definition, the company's "net worth"

exceeds "retained earnings," which is only a sub-part of the whole company's net worth. Although difficult to quantify due to its uncapped and contingent nature, the value of the guarantee given by Chibardun is best measured by the value implicit in Chibardun's promise, the company's net worth, which, in turn is best related to the company's balance sheet net worth. The key fact is that RTFC wanted the guarantee, without which it would not have provided the financing for these start-up ventures. Therefore, Chibardun's net worth, not merely its "retained earnings," subsidized the economic foundation of the entire loan transaction. Thus, Chibardun's guarantee as a practical economic matter exceeds the dollar limitation inherent in the accounting term, "retained earnings," and thereby violates the "except for retained earnings" limitation on subsidization in the first sentence of Wis. Stat. § 196.204(1). To the extent the subsidy exceeded Chibardun's retained earnings at the time the first loan was made and continues to exceed Chibardun's retained earnings for every year the guarantee remains in effect, Chibardun provided and is continuing to provide a subsidy in violation of Wis. Stat. § 196.204(1).

This conclusion is far from ineluctable. The legislature knew how to directly prohibit a loan guarantee when it wanted to. In Wis. Stat. § 196.525, it regulated a utility's "lend[ing] of credit." In Wis. Stat. § 196.795(5)(d), it expressly prohibited a public utility affiliate from "guarantee[ing] the obligations" of a nonutility affiliate. The legislature has also, quite clearly, eased regulation of telecommunications utilities: neither of these statutes applies to them.

The Status of Patronage Capital

To what extent the value of the guarantee's indirect subsidy exceeds Chibardun's retained earnings depends upon the characterization of Chibardun's "patronage capital." If patronage

capital is not part of retained earnings[14], the subsidies exceed retained earnings to a greater extent than if a part of retained earnings.

The Commission has adopted relevant sections of the Uniform System of Accounts. Account § 4550 is entitled "Retained Earnings." Section 4550(1) states: "This account shall include undistributed balance of retained earnings derived from the operations of the company and from all other transactions not includable in the other accounts appropriate for the inclusion of stockholders' equity." Under Chibardun's bylaws, all amounts "received and receivable from the furnishing of [regulated telecommunications] services in excess of operating costs and expenses" are credited to the patrons' capital accounts with "the same status as though paid to the patron in cash in pursuance of a legal obligation to do so." Although immediately deemed furnished to the cooperative as "corresponding amounts for capital"–in effect, paid back in—the revenues have been distributed.

Mr. Klingbeil believes that cooperatives should account for patronage capital as "Additional Paid-in Capital," under § 4520. Chibardun's accountant, Mr. Meier, testified that patronage capital does not fit the definition of additional paid-in capital. Given that everybody refers to these amounts as patronage "capital," and measured along side Chibardun's bylaw characterizing patronage capital as being furnished "for capital," Mr. Klingbeil's is the more reasonable interpretation.

Chibardun itself recognizes patronage capital as something other than retained earnings. Its 1996 bylaws amendment introduced the term "retained earnings," distinguishing it from patronage capital. Also, Chibardun's audited financial statements separately listed retained

[14] For Chibardun's accounting, the term "retained capital" is synonymous with "retained earnings."

capital and patronage capital, and Chibardun's auditor believes that retained capital is the equivalent for cooperatives of retained earnings.

Still, the Commission does not fault Chibardun's accountants (and management) for characterizing patronage capital as retained earnings. Cooperative accounting appears fairly complex. *See* Emmanuel S. Tipon, *Annotation: Co-Operative Associations: Rights in Equity Credits or Patronage Dividends*, 50 A.L.R. 3d 435 (1973). The Commission has no rules regarding the accounting for public utilities that are specific only to cooperatives. The annual report utilized by the Commission does not provide a place to account for patronage capital. Nor, are there authorities–either technical or legal–out there to guide companies like Chibardun. Under these circumstances, Chibardun's accounting judgments were not egregious.

In light of this and the preceding sections, the Commission finds that Chibardun's uncapped guarantee for its affiliate obligations to the RTFC exceeded the level of "retained earnings," which does not include patronage capital. This subsidy commenced in 1997 and continues today. Its calculation is detailed in Confidential Appendix B of the staff's Post-Hearing Brief (Column G, in particular), incorporated herein by reference.[15]

The Size of the Direct Subsidy

Staff testified in this proceeding that the additional value of the guarantee to the affiliates is equal to the amount the affiliates saved by not having had to pay a higher rate of interest or having had to obtain bond insurance. Chibardun did not charge the affiliates for this economic

[15] Confidential Exhibit 4 provided extensive income statement and balance sheet information for the years in question. Simple reference to the footnotes shows the amount of guaranteed RTFC borrowings and Chibardun's much lower retained earnings, labeled "retained capital." The relevant figures were tabulated and summarized in Confidential Appendix B to staff's Post-Hearing Brief, dated May 25, 2001.

accommodation, and thereby affected a direct subsidy. To arrive at this amount of savings, staff compared the interest rate on the RTFC loans with the interest rate charged by the Small Business Administration in similar transactions. Staff then determined what it would have cost to obtain these saving; and concluded that there was a range between 100 and 500 basis points.

This analysis is consistent with the court's approach in *Wabash Valley*, where the court stated, "The difference between the government's rate of interest and the rate the borrower would have otherwise had to pay is the subsidy; the cost to the government is the risk of default." *Accord*, R. Brealey and S. Myers, *Principles of Corporate Finance* 567 (1988)("The present value of a loan guarantee is the amount lenders would be willing to pay today to relieve themselves of all risk of default on an otherwise equivalent unguaranteed loan.")

In order to select a cost factor associated with the direct subsidy, the Commission considered what it had accepted as a reasonable guarantee fee in *Superior Water*, and the evidence presented at the hearing. In *Superior Water*, the Commission approved a fee of 50 basis points, on the assumption that that was "at or below the fair market cost of comparable loan or other credit guarantees . . . ." A letter from the RTFC's Kenneth Fried (an associate vice-president and account manager), analogized Chibardun's loan guarantees to a letter of credit, for which the appropriate fee would have been 50 basis points. In addition, Michael Theis testified that the St. Paul Cooperative bank has charged 50 basis points. Dennis Sandora, a banker called by Marcus, testified that the cost of obtaining the guarantees would have ranged from one to three percent.[16]

[16] Elsewhere in his testimony, Mr. Sandora stated that it would have cost as much as $1 million to obtain the guarantees.

Nevertheless, based on all the evidence, the Commission determines that the subsidy should be valued at 100 basis points. This determination was a very difficult one to make. The evidence is contradictory and confusing. Some witnesses testified that it was necessary to find the "cost" of the guarantees. Others testified that it was "value" that mattered. Nobody attempted to find the present value of the guarantee (a function, certainly, of the risk of default, among other factors). This is within the range of reasonableness proposed by the witness in this proceeding, but closer to the numbers suggested by the other witnesses and to the rate accepted by the Commission in *Superior Water*.

Conduct of the Commission

Chibardun contends that it was the Commission's responsibility to tell small telecommunications utilities that subsidies could include loan guarantees and argues that the Commission's efforts to address the issue in relevant generic and rulemaking dockets demonstrates that Wis. Stat. § 196.204(1), standing alone, does not include loan guarantees, or that if it does, it should not be applied in this case. The Commission is not to blame for Chibardun's situation.

In light of the authorities discussed above, the statute includes loan guarantees. Having held that, the utility has a point.

The Commission has been conducting rulemaking proceedings in the area of affiliate relationships since 1994. In that year, it opened two dockets, 1-AC-146 and 1-AC-147. The former docket was closed, without explanation, in 1997. The latter, six years after being opened, is still pending, but no rules have been issued. In 1997, the Commission opened a generic docket

on the same subject, 05-TI-158. In 1999, the Commission made determinations in this docket, which, had, they stood, would have specifically regulated loan guarantees as subsidies. After widespread criticism, however, the Commission rescinded its order. The rescission order stated that the Commission would "proceed promptly with further consideration of the issues in this proceeding, including the issues of whether rulemaking, further generic order, or a combination of the two is appropriate." On January 5, 2000, the Commission instituted docket 1-AC-191 to deal with affiliated relationships in the telecommunications industry, and has made substantial progress in drafting with the aid of an industry task force. However, work remains to be done.

Issue 2:

What remedies and/or sanctions are appropriate for Chibardun's admitted failure to timely file an affiliated interest agreement it had with Chibardun Cable T.V. Corporation, in violation of the requirements of Wis. Stat. § 196.52 (1992-93)?

Chibardun entered into an affiliated interest agreement with Cable Corp. in 1994. After Marcus complained to the Commission, Chibardun filed the document with the Commission. The utility contends that its failure to file was an oversight, but still concedes it violated Wis. Stat. § 196.52.

Now that the legislature has taken approval power away from the Commission, it is more important than ever that telecommunications utilities file their affiliated interest agreements with the Commission[17]. The reins of regulation may have been loosened, but they have not been

[17] There is at least the possibility that, had the agreement been on file, Marcus and others would have had notice of the activities of Chibardun and Cable Corp. Still, there is no evidence that such knowledge (assuming the notice was not merely constructive) would have changed history at all.

eliminated. The filing of affiliated interest agreements helps the Commission enforce the laws regulating cross-subsidization, a serious matter,[18] more so, not less, in this era of "deregulation."

The consequences of Chibardun's conduct are addressed in the discussion of Issue 7.

Issue 3:

Chibardun violated the requirements of Wis. Stat. §§ 196.52, and 196.219(3) and (4), by failing to timely file an affiliated interest agreement that adequately identified a transfer of certain cable assets to Chibardun Cable T.V. Corporation.

Chibardun contends that its Management Services Agreement with Cable Corp. covers the sale of 67 strand miles of cable to Cable Corp. It does not. By its terms, the agreement is for services, not the transfer of property. While the agreement, in one place, mentions "assets," the only reasonable way to read the language is that it covers a sale of assets incidental to the provision of services. The "services" covered by the agreement are "general administrative, management, technical, and other services, including accounting and data processing . . . ." Sec. 1.1.

Sec. 2 of the agreement is entitled "Payments." Under section 2.1, payments are for the "services" described in the preceding section, i.e., managerial, administrative and the like. The agreement cannot reasonably be read to apply generally to the purchase and sale of property, such as the 67 strand miles of fiber. Moreover, even if the agreement covered the transfer of

[18] "'Cross-subsidization' is the term describing any number of practices that benefit utilities or their subsidiaries at the expense of ratepayers, consumers, or other businesses competing with the utility in the unregulated field. . . . A fundamental precept to the effective regulation of diversifying utilities is that the costs of running a nonregulated venture should be borne by the customers of that activity, not by the ratepayers. In practice, this requirement means that the utility should not perform services for the unregulated subsidiary without being compensated." Jeffrey W. Knapp, *Comment: Effective State Regulation of Energy Utility Diversification*, 136 U. Pa. L. Rev. 1677 (1988). *See also U.S. West, Inc.v United States*, 48 F.3d 1092 (9th Cir. 1994).

assets like cable, Chibardun still violated the statute because it sold the cable to Cable Corp. before it filed the agreement.

Chibardun sold the fiber to its affiliate at book value, $41,600. There is evidence that this is the way telecommunications cooperatives have been instructed to do things. At the hearing, several witnesses attempted to determine the fair market value of the cable. No real experts testified; only people in the business, and they testified based almost entirely on hearsay.

Staff analyst Steve Kihm testified as to a methodology for pricing fiber using stock prices as a proxy. The analogy, while not directly reviewing market-based sales of fiber networks, clearly established as an analytical matter that net book cost cannot be the transfer value. The record also contained evidence of construction costs from Robert Ryan, an individual with 25 years experience in the construction and operation of cable television systems. The record is left with a market value range from approximately $83,200 to approximately $167,500. It was unreasonable for Chibardun to believe it could sell this asset at book value; its own accountant never suggested that because assets are recorded at cost that sets the price Chibardun should obtain when selling to third parties. Chibardun should have in this instance applied the available "higher of cost or market" (HOCOM) test, which is a long-recognized methodology used in the industry and by the Commission. Use of that test created an obviously more reasonable sale price than book cost for selling the installed fiber asset to its affiliate Cable Corp. Even making allowances for methodology differences, difficulties in finding comparables, and the value range noted, the evidence supports at least the low end of the market valuation of the transferred fiber, $83,200. Chibardun shall be ordered to charge and receive payment from Cable Corp. the

unpaid difference, plus interest on the unpaid difference between the foregoing market value and the original net book cost.

Issue 4:

Chibardun violated Wis. Stat. §§ 196.52, and 196.219(3) and (4) by not timely filing affiliated interest agreements that adequately describe loan activities with its affiliates.

Chibardun loaned money to Telcom and Communications in 1997, in addition to guaranteeing the RTFC borrowings. Affiliated interest agreements were on file, but they covered only general administrative services and stated nothing about loans. Later agreements mention "financing." Chibardun should have mentioned "financing" sooner.

Issue 5:

Chibardun is adequately allocating certain payroll expenses and costs of capital assets to avoid subsidization to the subsidiaries contrary to Wis. Stat. § 196.204(1)?

The evidence establishes that staff and Mr. Stolper disagree with Chibardun's current cost allocation methods. Evidence regarding the charges creating distortions in Chibardun's assignment of certain executive and accounting payroll expenses for the years 1997 through 2000 was placed on the record and tried by the parties as contemplated by the Commission's notice. The Commission rejects the Administrative Law Judge's determination in the Proposed Final Decision that past practices were not at issue.

Staff's evidence regarding this issue is persuasive. The costs of executive and accounting payroll properly allocated could produce a significant per access line shift in expenses to the affiliates and away from Chibardun. Such a re-alignment would be more reflective of 1997 as a

start-up year and the years immediately following in which the affiliated ventures expanded. The failure of Chibardun to properly allocate its costs and expenses so as not to subsidize nonregulated activities violated the second sentence of Wis. Stat. § 196.204(1). Staff testified about two- and three-prong allocators (detailed below and described in Exhibit 16, last page relating to docket 05-TI-124) that would better assign costs that could not be directly attributable to one entity. Chibardun's own accountant did not have fundamental objections to creating a three-prong allocator with some minor modifications. These re-allocations are necessary to properly reflect that the affiliates of Chibardun now have more assets and about the same revenues as the parent. The allocation of most of the executive and accounting payroll to Chibardun, even in the year 2000, represents a gross mis-allocation of costs, still far from the norms of current industry methodologies.

Chibardun's violation of its duty of proper cost allocation must be remedied by removing the on-going effects of the violation in the books of Chibardun and its affiliates. As proposed by staff, the two- and three-prong allocators shall be applied to the years 1997 through 2000, and a one-time adjustment made to the 2001 books, with interest. Chibardun shall submit proof of the proper corrective entries to the Commission within 90 days of this decision.

Issue 6:

Chibardun is not pricing services and property, including intangible assets, furnished to the subsidiaries according to methodologies and at price levels that do not provide subsidies to the subsidiaries in violation of Wis. Stat. § 196.204(1)?

Issue 6 does not ask if Chibardun is presently furnishing property and services in violation of Wis. Stat. § 196.204(1). Rather, the Commission is asking, in issue 6, whether

Chibardun has methods in place adequate to the task of identifying and preventing unlawful affiliate subsidies. Chibardun values transactions with affiliates at cost. Unquestionably, this is foolish. If all transactions are at cost, regardless of the particular circumstances, Chibardun has no way of determining whether the value of the property or service as compared to cost will exceed its retained earnings. To avoid breaking the law, Chibardun must develop a method of valuing the goods and services it provides to its affiliates.

Staff requests that Chibardun be ordered to price property and services according to the relationship between cost and market value, i.e., HOCOM/LOCOM. In the absence of another method, Chibardun might be wise to take staff's advice. But, the Commission does not at present specifically require telecommunications utilities to utilize HOCOM/LOCOM. Therefore, Chibardun is not violating Wis. Stat. § 196.204 for not utilizing this methodology.

Wis. Stat. § 196.204(3) provides: "The commission shall establish the necessary minimum accounting and reporting requirements, and structural separation requirements if necessary, for telecommunications utilities to enable it to enforce this section." Therefore, the Commission needs to formally prescribe HOCOM/LOCOM by rule or an accounting order[19], if it expects telecommunications utilities to utilize it. In the absence of a formal accounting treatment directive, the Commission will have to continue to enforce the statute case-by-case.[20]

[19] The Commission notes that its accounting prescription actions are exempt from rulemaking, per Wis. Stat. § 227.01(13)(s), and Wis. Stat. § 196.204(3), although directing the establishment of minimum accounting and reporting requirements to enforce Wis. Stat. § 196.204, does not expressly mandate rulemaking .

[20] Staff contends that the Commission "has historically viewed as reasonable," the Federal Communications Commission rule requiring use of HOCOM/LOCOM. In particular cases, this may be so. But, the Commission chose not to adopt the FCC rule.

Goodwill

Staff and Marcus claim that Chibardun is not properly valuing the goodwill it is providing to its affiliates.

The $500 figure chosen by Chibardun is not a credible figure, no attempt having been made to calculate the compensation according to Chibardun's cost or the goodwill benefit the affiliates expected to obtain. The record contains facts from which it can be inferred that $500 is arbitrary. For example, Chibardun officials stated that Cable Corp. had its own good name after operating only since 1983. (Ex. 1, p. 16). Inferentially, Chibardun's reputation after 44 years operating in the area should be that much more valuable. (Ex. 5, By-laws, p. 1). Former customers of Chibardun living outside its service territory have called it for service. (Tr. 429). Most tellingly, Chibardun itself puts a high value on its reputation by announcing its parental status in the second sentence of the affiliate's brochure. (Tr. 430). Chibardun promoted to its lender the fact that it had been engaged for years in non-regulated businesses in the area surrounding its regulated service territory, thereby building name recognition. (Vergin, Tr. 460; Ex. 109, p. 5). Together the facts demonstrate a considerable interest in allowing the affiliates to be known as part of the Chibardun family.

As goodwill is a "non-book" item for regulated utilities, royalty and license fee arrangements for goodwill cannot resort to exact booked cost figures to determine value. By their nature, goodwill components are intangible, as is their ultimate value. But it stands to logic that an affiliate wants its parent goodwill to enhance its prospects of business success, which, in turn, may be most closely measured by sales generated. The use of the Chibardun name in the sales brochure shows this connection of the name to the promotion of affiliate sales. Staff's

suggested use of a percentage of gross revenues is a reasonable royalty compensation method much more likely to avoid improper subsidization than the unreasonable $500 flat fee. A one percent of gross sales figure compares favorably in light of a figure of two percent of capitalization in unregulated operations that the New York Public Service Commission successfully defended in *Re Rochester Telephone Co.*, 145 PUR 4th 419 (N.Y. PSC 1993), *aff'd sub nom., Rochester Tel. Corp. v. PSC*, 614 N.Y.S. 2d 454, 201 A.D.2d 31 (1994) and 87 N.Y. 2d 17, 660 N.E.2d 1112, 1995 N.Y. LEXIS 3565, 647 N.Y.S. 2d 333, 166 PUR 4th 205 (1995). The *Rochester* formula compelled payment based on investment, without regard for the revenues of the affiliate using the goodwill. A percentage of revenue formula, in contrast, better matches the obligation to pay for the value with the hoped-for revenue benefits associated with the anticipated use of the intangible goodwill. This determination, however, does not foreclose Chibardun from demonstrating in the future that a different compensation method for goodwill is more consistent with the uses made of the goodwill or the goodwill value transferred.

The Commission further finds that, given the current success of the affiliate venture, staff's proposal to do a one-time liquidation of all 1997-2000 goodwill has merit. It may be reasonably inferred that the utility's goodwill is no longer as crucial as the affiliate is successful and no longer in a start-up phase after four years of operation. For the period of calendar years 1997 through 2000, the affiliates' liability for use of goodwill shall be liquidated, as described above, and a one-time adjustment made to Chibardun's books for the year 2001. The adjustment shall include interest as provided in Order ¶ 4.d.

Issue 7:

What remedies and/or sanctions are appropriate and why?

Wis. Stat. § 227.01(3) defines a class 2 proceeding as one in which an agency seeks to impose sanctions or penalties. The Commission need not have given Chibardun a class 2 proceeding because the Commission could have limited its potential enforcement measures strictly to prospective remedial actions authorized under Wis. Stat. § 196.37(2), such as those ultimately ordered herein. Because of the remedies ordered, whether or not the Commission lacks authority to impose "sanctions and penalties" need not be resolved in this decision.[21] However, the attorney general, not the Commission, has the power to seek forfeitures. *Pub. Serv. Comm. v. Wisconsin Bell, Inc.*, 211 Wis. 2d 749, 566 N.W. 2d 496 (Ct. App. 1997). Thus, the Commission will separately make a referral to the attorney general for statutory violations found in this proceeding. The Commission also lacks authority to award any damages to Marcus. That is up to the attorney general, per Wis. Stat. § 196.219(4m) or, as more likely will be the case, Marcus may sue for damages.

The Commission does have the power to make "just and reasonable" orders to govern future conduct per Wis. Stat. § 196.37(2). Because Chibardun failed to have proper affiliated interest agreements on file with the Commission, it will have to submit them as provided in Order ¶ 2 and make the prescribed adjustments for the loan guarantees, the sale of fiber, executive and accounting payroll cost allocations, valuation of goodwill, and the loans to affiliates. The Commission should not accept any agreement as complying with the statutes (and

[21] This is not to say that Chibardun has been injured by this process. A class 2 proceeding provides a respondent with the maximum procedural protections available under the statutes (including full discovery and the benefit of a proposed decision). In other words, Chibardun may have received more process than was "due."

the decision in this docket) that does not fairly compensate Chibardun for the goods and services provided to its affiliates. Such compensation must include interest, consistent with long-established Commission practice regarding orders for refunds. To be assured all subsidizing effects are removed, including the effect of Chibardun's carrying the cost of the subsidy, the interest rate should be the higher of either the legal rate under Wis. Stat. § 138.04, or Chibardun's cost of capital or long-term debt.

To help ensure that Chibardun does not again unlawfully subsidize its affiliates, Chibardun will have to submit to the Commission reports demonstrating compliance with the Commission's order and detailing all transactions with Cable Corp. and Telcom at periodic intervals until December 31, 2002.

ORDER

1. This Final Decision is effective upon mailing.

2. Within 90 days after the mailing date of the final decision in this proceeding, Chibardun shall file new affiliated interest agreements in accordance with this decision.

3. Chibardun shall within 120 days of the mailing date of this Final Decision, terminate (on its own or with the cooperation of its lender) all unlawful guarantees of borrowings from RTFC that exceed Chibardun's retained earnings (excluding patronage capital). Within 15 days of its compliance with this paragraph, Chibardun shall file proof of such compliance in such form as the staff deems acceptable.

4. Chibardun shall within 90 days of the mailing date of this decision obtain payment from the affiliates of an amount equal to the sum of monthly amounts calculated as one percent

of the outstanding principal loan balances due RTFC each month from the date of loan inceptions through the date the guarantees are removed (*i.e.*, the 100 basis points of interest expense avoided by the affiliates). Repayment of amounts shall be with interest. Within 15 days of its compliance with this paragraph, Chibardun shall file proof of such compliance in such form as the staff deems acceptable.

5. Within 90 days of the mailing date of this Final Decision, Chibardun shall obtain payment and make the necessary accounting entries and book adjustments in amended and re-filed affiliated interest agreements, including the following:

a. For the years 1997 through 2000, Chibardun shall apply a three-prong allocator (employees, assets, and operating expenses) to its allocation of executive payroll costs for the years 1997 through 2000, and apply a two-prong allocator (expenses and assets) to accounting payroll costs. The adjustments shall be made in a one-time adjustment on Chibardun's books for calendar 2001.

b. Chibardun shall adjust its books to reflect the transaction for the transfer of 67 strand miles at $83,200.

c. Chibardun shall apply a royalty or license fee of one percent of gross sales of the affiliates for the years 1997 through 2000, which shall liquidate the affiliates' liability for the use of intangible goodwill, trademarks, and service marks (collectively, "goodwill") for that period. Any future use of the goodwill by affiliates after calendar year 2000 shall provide for use of the same formula, unless a change is justified to the Commission.

d. Interest for the benefit of Chibardun is required for any past adjustments under a. through c. above, and going forward in any re-filed affiliated interest agreements. The applicable rate of interest for the foregoing remedy adjustments shall be the higher of either (a) the legal rate under Wis. Stat. § 138.04, or (b) Chibardun's cost of capital or long-term debt.

e. Chibardun shall cooperate with staff and file information with the Commission demonstrating compliance with a. through d. above.

6. Within 30 days after the mailing date of the final decision in this proceeding, Chibardun shall file with the Commission an accounting of all transactions with affiliates, above $5,000 in aggregate value on a service-by-service basis, for the three full calendar months preceding the month of mailing of this decision. Chibardun shall file similar reports, within 30 days after each completed calendar quarter, through the period ending December 31, 2002.

7. Within 30 days after the effective date of the final decision in this proceeding, Chibardun shall file with the Commission a proposed method of valuing transactions with affiliates in order to avoid illegal subsidies.

Dated at Madison, Wisconsin, _____

By the Commission:

_____

Lynda L. Dorr
Secretary to the Commission

LLD:ESM:MSV:KHK: kcd:g:\order\Approved\1090-TI-100 Final

See Attached Notice of Appeal Rights

Notice of Appeal Rights

Notice is hereby given that a person aggrieved by the foregoing decision has the right to file a petition for judicial review as provided in Wis. Stat. § 227.53. The petition must be filed within 30 days after the date of mailing of this decision. That date is shown on the first page. If there is no date on the first page, the date of mailing is shown immediately above the signature line. The Public Service Commission of Wisconsin must be named as respondent in the petition for judicial review.

Notice is further given that, if the foregoing decision is an order following a proceeding which is a contested case as defined in Wis. Stat. § 227.01(3), a person aggrieved by the order has the further right to file one petition for rehearing as provided in Wis. Stat. § 227.49. The petition must be filed within 20 days of the date of mailing of this decision.

If this decision is an order after rehearing, a person aggrieved who wishes to appeal must seek judicial review rather than rehearing. A second petition for rehearing is not an option.

This general notice is for the purpose of ensuring compliance with Wis. Stat. § 227.48(2), and does not constitute a conclusion or admission that any particular party or person is necessarily aggrieved or that any particular decision or order is final or judicially reviewable.

Revised 9/28/98

Docket 1090-TI-100

APPENDIX A
(Contested case/Hearing held)

To comply with Wis. Stat. § 227.47, the following parties who appeared before the agency are considered parties for purposes of review under Wis. Stat. § 227.53.

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(Not a party but must be served)
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